IN THE

THE SUPREME COURT

OF THE

UNITED STATES.

October Term 1901.

EXCELSIOR WOODEN PIPE COMPANY,

Appellant,

vs.

PACIFIC BRIDGE COMPANY AND CHARLES P. ALLEN,

Appellees.

No. 375.

Appellant's Brief on Appellees' Motion to Dismiss Appeal.

This is an appeal from a final decree, dismissing the suit for want of jurisdiction.

The suit was brought in the Circuit Court of the United States for the District of Washington, Northern Division.

History of the Appeal.

The record on appeal shows the following steps in the suit:

The Bill of Complaint was filed March 23d, 1900, and process duly issued and served.

Answer was filed June 9th, 1900.

Replication was filed June 21st, 1900.

Time having expired September 21st, 1900, under Equity Rule 69, within which to take proofs, defendants filed motion to extend the time. The motion for extension was taken under advisement.

Complainant filed a motion for a decree on the pleadings and papers on file in the case.

On November 5th, 1900, these motions being on the calendar, the Court, without hearing them, requested argument on the question of jurisdiction, heard such argument, and, thereupon, divested itself of jurisdiction, and the same day made a decree dismissing the bill for want of jurisdiction. (Page 38 of record).

Thereafter, on December 3d, 1900, complainant perfected an appeal from said decree to the United States Circuit Court of Appeals for the Ninth Circuit. (Record pages 38 to 41).

Appellees, on January 28th, 1901, filed in said Court of Appeals a motion to dismiss said appeal "for lack of jurisdiction in this Court to hear and determine the question presented by the record herein for determination, for the reason that the order of the Circuit Court of the United States from which such appeal is prosecuted was and is an order dismissing said cause solely for want of jurisdiction in said Circuit Court to hear and determine the same, and in which order no other question was involved, nor determined by said Circuit Court; and this Court is without authority to exercise appellate jurisdiction to review by appeal a final decision of the Circuit Court in which decision the jurisdiction of that Court was the sole question in issue and decided."

On May 6th, 1901, the United States Circuit Court of Appeals for the Ninth Circuit, allowed said motion, and dismissed the appeal for want of jurisdiction to entertain it, upon the grounds set forth in the motion, to wit, that the sole question in the case was the jurisdiction of the Court below. The opinion of the Circuit Court of Appeals, granting the motion to dismiss, will be found in the

printed record page 45. It is also reported in 109 Federal Reporter, 497.

The mandate of said Court of Appeals dismissing the appeal was thereafter duly issued, and on the 27th day of May, 1901, was filed and spread upon the minutes of the Court below. (Record pages 42–43).

On the same day, the 27th day of May, 1901, complainant, present appellant, perfected the present appeal to this Court from the order and decree of the Circuit Court of the United States for the District of Washington, Northern Division, made and entered on the 5th day of November, 1900, dismissing said suit for want of jurisdiction. (Record pages 47–52).

This appeal is taken under Section 5 of the Act of March 3rd, 1891, defining and regulating in certain cases the jurisdiction of the Courts of the United States.

The appeal is perfected in accordance with Rules 35 and 36 of this Court.

The errors assigned (page 50 of printed record), are:—

First—The error of the Court in holding that upon examination of the pleadings, the suit did not really and substantially involve a dispute or controversy properly within the jurisdiction of the Court, and that said Court should not further exercise jurisdiction.

Second—The error of the Court in dismissing the suit for want of jurisdiction.

Argument.

The present appeal is timely. It may be taken at any time within two years from the making and entering of the final decree appealed from.

Holt vs. Indiana Manufacturing Co., 176, U. S. 68.

If, however, the appeal from the question of jurisdiction is taken up by way of the certificate mentioned in the first clause of Sec. 5 of the Act of 1891, said certificate must be signed within the term at which the decree ap-

pealed from was made. Otherwise the appeal is out of time.

Maynard vs; Hecht, 151 U. S. 324.
Colvin vs. Jacksonville, 158 U. S. 456.
The Bayonne, 162 U. S. 329.
Merrit vs. Bowdoin College, 169 U. S. 551.

When, therefore, a certificate is *used*, or when one is *needed* to present the sole question of jurisdiction to this Court, the term of the lower Court affects and limits the time within which the appeal may be taken. Otherwise the two year limit is unaffected.

It is not every case which needs a certificate, to present the sole question of jurisdiction, upon appeals of this nature.

Where the decree appealed from shows on its face that the sole question decided is one of jurisdiction, and where the record on appeal shows that the only question presented to this Court for determination is one of jurisdiction, these are held to be the equivalent of a certificate, and no certificate is needed.

Huntington vs. Laidley, 176, U. S. 668.
Re Lehigh Mining & Manufacturing Co., 156 U. S. 322.
Shields vs. Coleman, 157 U. S. 168.
Interior Construction & Improvement Co. vs. Gibney, 160 U. S. 217.
Van Wagenen vs. Sewall, 160 U. S. 369.
Chappell vs. U. S., 160, U. S. 499.
State of Ark. vs. Schlierholz, 179 U. S. 598.

In Huntington vs. Laidley, and also in State of Ark. vs. Schlierholz, above cited, the Court says: "In order to maintain the appellate jurisdiction of this Court, under this clause, the record must distinctly and unequivocally show that the Court below stands up for consideration a single and definite question of jurisdiction. *This may appear in either of two ways: by the terms of the decree ap-*

pealed from, and of the order allowing the appeal, or by a separate certificate of the Court below."

In the present appeal, the first of these ways is adopted. The decree (page 38) shows by its terms the determination of the sole question of jurisdiction. The order allowing this appeal (page 48) shows on its face that the sole question sent up for consideration is one of jurisdiction. The petition for said order (page 47) shows the same; the assignments of error (page 50) embody only this single question; and the motion of appellees in the Circuit Court of Appeals (page 44) and the opinion of the said Court (page 45) present further evidence of this sole question of jurisdiction, herewith presented for consideration.

It follows that in this appeal, no separate certificate is required, and the appeal is both timely and proper, and is unaffected either by the absence of such certificate, or by term signing.

The case of Holt vs. Indiana Manufacturing Co., above cited, appears to have taken the course of the case at bar, in that it was first appealed to the Circuit Court of Appeals, which Court dismissed it for want of jurisdiction to entertain the appeal, and it was, thereafter, taken to this Court. The time elapsing, one year and six months, between the last appeal and the entry of the decree appealed from, precludes any question of term time.

Colvin vs. City of Jacksonville, 158 U. S., 456, and The Bayonne, 159 U. S., 687, do not, as counsel for appellees state, hold that the equivalent of a formal certificate must also be done in term time. These cases hold nothing further than that the *certificates* used therein, were out of term time.

The case of Davis vs. Geissler, 162 U. S 290, resembles the case at bar no further than the use of the customary words in dismissing for want of jurisdiction. That case was *at law*, and it does not appear from the writ of error, nor from any proceeding in the case, that the question of jurisdiction was the sole question sent up by the lower court.

In the case at bar every step, the decree itself, the determination in the Circuit Court of Appeals, the peti-

tion for and order allowing the appeal, and the assignment of errors, shows plainly this sole question. This Court does not have to pick out from the record the question of jurisdiction from amongst others. There is no other question there.

We submit that there can be no greater conformity with what this Court has said to be the equivalent of a formal certificate, than this record presents.

The peculiar reasons for requiring the signing of a formal certificate during term time, do not apply to regular appeal proceedings within the two years limit. And if such regular appeal proceedings are proper, in a given case, without a formal certificate, being of themselves the equivalent of such certificate, there is no good reason why term time should affect them.

Respectfully submitted,

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